

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION**

### **SPECIAL ORDER BY CONSENT**

#### **WITH THE**

#### **TOWN OF CAPE CHARLES**

### **SECTION A: Purpose**

This is a special order by consent issued under the authority of Sections 62.1-44.15(8a) and (8d) of the Code of Virginia between the State Water Control Board and the Town of Cape Charles to resolve certain violations of environmental laws and regulations.

### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. ACode $\equiv$  means the Code of Virginia (1950), as amended.
2. ABoard $\equiv$  means the State Water Control Board, a permanent citizen's board of the Commonwealth of Virginia as described in Code  $\S\S$  62.1-44.7 and 10.1-1184.
3. ADEQ $\equiv$  means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Code  $\S$  10.1-1183.
4. ADirector $\equiv$  means the Director of the Department of Environmental Quality.
5. ARegional Office $\equiv$  means the Tidewater Regional Office of DEQ.
6. AOrder $\equiv$  means this document, also known as a consent special order.
7. "UST" means underground storage tank.
8. "Cape Charles" and "Town" means the Town of Cape Charles, the UST owner within the meaning of the Virginia Code  $\S$  62.1-44.34:8.
9. ARegulations $\equiv$  means 9 VAC 25-580-10 *et seq.* – Underground Storage Tanks: Technical Standards and Corrective Action Requirements.

### **SECTION C: Findings of Facts and Conclusions of Law**

1. On May 16, 2000, DEQ staff inspected five USTs servicing emergency generators at the following locations in Cape Charles: Mason Ave. Lift Station, Pine St. Pump Station, Plum St. Pump Station, Washington Ave. Lift Station, and the Cape Charles Wastewater Treatment Plant. The USTs were not in compliance with the requirements of the Regulations for spill prevention, overflow prevention, and cathodic protection. 9 VAC 25-580-60(1) requires that by December, 1998, all existing USTs must either be upgraded to comply with new performance standards or be closed out in accordance with the Regulations.
2. A compliance assistance letter was sent to Cape Charles on March 1, 2000, from DEQ notifying them that DEQ records indicated that their tanks were noncompliant and that they needed to upgrade or close them. On May 25, 2000, DEQ sent a Warning Letter requesting a response by July 1, 2000. On June 9, 2000, TRO received a response from the Town Manager with plans to remove the tanks.
3. On July 7, 2000, DEQ sent a Letter of Agreement (LOA), to Cape Charles that required the work to be completed by September 15, 2001. The LOA was signed and agreed to by the Town. On August 24, 2001, the Town Manager sent a letter to DEQ explaining the work was not completed and the Town would be unable to make the September 15, 2001, deadline. An extension was requested and DEQ granted an extension until November 1, 2001.
4. The removal of the tanks was not completed by November 1, 2001. On November 29, 2001, DEQ issued Notice of Violation No. 01-11-TRO-007 to Cape Charles for failing to complete the UST upgrades and submitting documentation that the work had been completed.

### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Cape Charles, and Cape Charles agrees to perform the actions described in Appendix A of this Order and to pay a civil charge of \$5,218 in settlement of the violations cited in this Order.

1. \$218 of this civil charge shall be paid within 30 days of the effective date of this Order. The payment shall note that it is being made pursuant to this Order and shall include Cape Charles' federal identification number. Payment shall be made by check payable to the "Treasurer of Virginia" and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, Virginia 23240

2. \$5,000 of this civil charge shall be satisfied upon completion by Cape Charles of a Supplemental Environmental Project (ASEP) pursuant to Virginia Code § 10.1-1186.2 and as described in

Appendix B of this Order.

3. In the event that the SEP is not performed as described in Appendix B, upon notification by DEQ, Cape Charles shall pay the amount specified in Paragraph 2 above within 30 days of such notification according to the procedures specified in Paragraph 1 above.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of Cape Charles, for good cause shown by Cape Charles, or on its own motion after notice and opportunity to be heard.
2. Nothing herein shall be construed as altering, modifying, or amending any term or condition contained in any permit issued by the Board.
3. This Order addresses only those violations specifically identified herein. This Order shall not preclude the Board or Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the site as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.
4. For purposes of this Order and subsequent actions with respect to this Order, Cape Charles admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
5. Cape Charles consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
6. Cape Charles declares it has received fair and due process under the Administrative Process Act, Code §§ 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
7. Failure by Cape Charles to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
8. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
9. Cape Charles shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other act of God, war, strike, or such other occurrence. Cape Charles must show that such circumstances resulting in noncompliance were beyond his control and not due to a lack of good faith or diligence on his part. Cape Charles shall notify the Director or the Director of the Regional Office in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director and the Director of the Regional Office within two business days of learning of any condition listed above, which Cape Charles intends to assert will result in the impossibility of compliance, shall constitute waiver of any claim of inability to comply with a requirement of this Order.

- 10. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.
- 11. This Order shall become effective upon execution by both the Director or his designee and Cape Charles. Notwithstanding the foregoing, Cape Charles agrees to be bound by any compliance date which precedes the effective date of this Order.
- 12. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Cape Charles. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Cape Charles from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

By its signature below, Cape Charles voluntarily agrees to the issuance of this Order.

And it is so Ordered this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

---

Robert G. Burnley, Director  
Department of Environmental Quality

Cape Charles voluntarily agrees to the issuance of this Order.

By: \_\_\_\_\_

Date: \_\_\_\_\_

Commonwealth of Virginia

City/County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_ day of

\_\_\_\_\_, 2002, by Francis Lewis, who is Mayor of

Cape Charles, on behalf of the Town of Cape Charles.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_.

APPENDIX A  
TOWN OF CAPE CHARLES

The Town of Cape Charles shall:

1. Mail all submittals and reports required by this Appendix A to:  
Francis L. Daniel, Regional Director  
DEQ, Tidewater Regional Office  
5636 Southern Blvd.  
Virginia Beach, VA 23462
2. By May 1, 2003, complete closure of USTs located at: Mason Ave. Lift Station, Pine St. Pump Station, Plum St. Pump Station, Washington Ave. Lift Station, and the Cape Charles Wastewater Treatment Plant. Closure shall be conducted in accordance with Part VII of the Regulations
3. By July 1, 2003, submit all documentation required by Part VII of the Regulations to DEQ.
4. In the event that a release has occurred, notify DEQ and clean up in accordance with Part V of the Regulations.

## **APPENDIX B**

### **CAPE CHARLES – SUPPLEMENTAL ENVIRONMENTAL PROJECT**

1. The supplemental environmental project (ASEP≡) to be performed by Cape Charles is the stabilization of shoreline in the Cape Charles Harbor for the purpose of protecting and preserving adjacent tidal wetlands. Cape Charles owns the "Fish House" property adjacent to the Harbor. An underground pipe through the property provides tidal exchange for wetlands that are otherwise cut-off from the Harbor. The shoreline of the property is eroding into Harbor. Site debris and nutrient-laden sediment are impacting water quality in the Harbor. They are also choking the pipe and interfering with the tidal exchange in the marsh.

Specifically, the Town proposes to:

- 1) remove the debris immediately behind the bulkhead area,
  - 2) examine and determine the appropriate method of protection for the north side return bulkhead,
  - 3) install shoreline protection at the north side bulkhead, and
  - 4) install or replace the piping connecting the existing pipe under Rt. 1108 to the pipe which extends into the harbor.
2. The SEP shall be completed by April 1, 2003.
  3. Cape Charles certifies that they have not commenced performance of the SEP prior to the identification of the violations cited in this Consent Order and the approval of the SEP by DEQ.
  4. The net cost of the SEP to Cape Charles shall not be less than \$5,000. In the event that the final cost of the SEP is less than this amount, Cape Charles shall pay the remainder of the amount to the Commonwealth of Virginia, unless otherwise agreed to by DEQ. Net costs shall mean the costs of the project minus any tax savings, grants and first-year operation cost reductions or other efficiencies.
  5. Cape Charles acknowledges that it is solely responsible for completion of the SEP. Any delegation of funds, tasks, or otherwise by Cape Charles to a third party, shall not relieve Cape Charles of its responsibility to complete the SEP as contained in this Order.
  6. Cape Charles shall obtain all State and Federal permits required for the completion of the SEP.
  7. Cape Charles shall provide DEQ with written verification of completion of the SEP by providing a statement of completion by May 1, 2003.
  8. Cape Charles shall submit verification to DEQ in the form of invoices of the final overall cost of the SEP by May 1, 2003.

9. In the event that Cape Charles publicizes the SEP or the results of the SEP, Cape Charles shall state in a prominent manner the project is part of a settlement for an enforcement action.
10. DEQ has the sole discretion to determine whether the SEP has been completed in a satisfactory manner.